United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

TO : Richard L. Ahearn, Regional Director
Region 3

October 29, 1993

FROM : Robert E. Allen, Associate General Counsel
Division of Advice

SUBJECT: Gannett Rochester Newspapers, Inc.
Cases 3-CA-17693 and 3-CA-17715

530-6050-0120
530-6050-0140
530-6050-0800
530-6067-2060-3300
530-6067-2060-3375
530-6067-2070-6760
530-6067-2070-6770

These Section 8(a)(5) cases were submitted for advice concerning: (1) whether the charge filed in Case 3-CA-17715 is time-barred by Section 10(b);[1] (2) whether the Employer insisted to impasse on a permissive or an illegal subject of bargaining that foremen and assistant foremen who voluntarily chose not to be Union members would not be covered by the terms of the collective-bargaining agreement; (3) whether the Employer's insisting to impasse on such a proposal was unlawful because the proposal required the Unions to accept statutory Section 2(11) supervisors into the bargaining units; and (4) whether the Unions waived their right to bargain about the Employer's union shop proposal.

FACTS

Gannett Rochester Newspapers, Inc. (Employer) voluntarily recognized Local 36 and Local 503 of the Graphic Communications International Union. ("Local 36," "Local 503" or "the Unions") The Unions represent the Employer's pressmen and photoengravers in two separate bargaining units. Local 36 represents 49 pressmen who worked in the Employer's pressroom, and Local 503 represents 16 photoengravers who worked in the Employer's camera/platemaking department. The Employer has had a long-standing collective bargaining relationship with both Unions dating back over several decades.

The most recent collective-bargaining agreements between the Employer and each of the Unions expired on December 31, 1990. The Employer then began negotiating new contracts with Local 36 and Local 503 on January 15, 1991,

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[1] The Region has found that there is no Section 10(b) issue in Case 3-CA-17693 involving Local 36, because there was no hiatus in bargaining between the parties in that case. The Region has not requested advice on this issue.

and January 22, 1991, respectively. The Employer and Local 36 participated in a total of 27 collective bargaining sessions extending through January 6, 1993. Within approximately the same time period, the Employer and Local 503 participated in a total of 16 collective bargaining sessions, extending through December 17, 1992. There was a 10-month hiatus in bargaining between Local 503 and the Employer from February 25, 1992, to December 17, 1992.

With respect to the most recent collective-bargaining agreements between the parties, each contained a traditional union-security clause that required employees to become and remain members of the Union as a condition of employment. The Employer and the Unions have historically agreed to include the foremen and assistant foremen in their respective bargaining units.[2] In addition, the expired contract between the Employer and Local 36 provided that the foremen and assistant foremen had the option of becoming Union members. However, the foremen and assistant foremen were not required to become Union members nor were they removed from coverage under the collective-bargaining agreement if they decided not to join the Union. Similarly, the expired contract between the Employer and Local 503 provided that foremen and "supervisors" had the option of becoming Union members.

As stated above, the Employer and Local 503 began negotiations for a new contract on January 22, 1991. The Employer's first proposal included a union shop clause that read as follows:

Article 4-Union Shop

> Section 1. Any employee covered by this agreement may or may not be a member of the Union (such decision being voluntary). It is understood that the day foremen, assistant day foremen, night foremen, and assistant night foremen may or may not be members of the Union. They shall, however, be permitted to perform bargaining unit work without restriction, **and in the event non-union status is elected he (they) shall not be covered by the provision of the collective bargaining unit.** (Emphasis added)

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[2] The Employer and Local 36 agree that the foremen and assistant foremen, in the bargaining unit, are statutory supervisors. The Employer and Local 503 agree that the foremen, in the bargaining unit, are statutory supervisors and that the assistant foremen are statutory employees.

As early as the second bargaining session, on February 2, 1991, Local 503 objected to the Employer's union shop proposal. Local 503's president, Willard J. Cole, stated that the Union membership would not agree to the Employer's union shop proposal, and that the International Union would not agree to it either. At that same bargaining session, the Employer's representative, Michael Monscour, stated that he wanted the supervisors out of the Union and on the side of the Employer. Cole objected to the Employer's proposed union shop clause, stating that if all the employees elected not to be in the Union, he still would have to represent them. Cole further stated that the proposal would cause division among the unit employees and would cause the assistant foremen to lose certain benefits, such as the right to a pension. Local 503 also objected to the open shop clause in the Employer's proposal.

Throughout the course of negotiations, the Employer insisted that its proposed union shop clause be included in the final contract agreed to by the parties. At one point, the Employer offered to revise its initial union shop proposal by requiring the employees to be Union members for only the first year of the contract while giving them the option thereafter of choosing whether they wanted to be Union members. Cole also objected to this proposal and stated that the parties could not reach an agreement unless there was a union-security clause in the contract that obligated employees to be in the Union.

Later in negotiations, in an effort to reach an agreement on the union security issue, Local 503 proposed to delete two sections of the union security article contained in the expired contract. These two sections dealt with the Employer's obligation to discharge an employee, within 10 days after receiving written notice from the Union either that such employee had not become a member of the Union, or that his membership had been terminated because of failure to pay the required dues. Notwithstanding these concessions, the Employer continued to object to the Union's proposal and to insist on its own open shop clause as a condition to reaching an agreement. In fact, Monscour stated, "Corporate headquarters directed me to take the union-security clause out of the contract."

As a result of the deadlock on the issues of union security and merit pay, the parties held a negotiating session on January 7, 1992, with a New York state mediator present. At the conclusion of this session, the parties were for the most part no closer on the issues of merit pay

and union security.[3] The Employer told Local 503 that it would be submitting its best, firm and final offer. Local 503 received that proposal on January 13, 1992. On February 22, 1992, the membership rejected the Employer's "best, firm and final" offer.

Thereafter, the Employer and Local 503 met again on February 25, 1992, at which time the parties reiterated their respective positions on union security and merit pay. Monscour ended the session by stating, "We are close to impasse." At the end of this negotiating session, the aforementioned 10-month hiatus in bargaining began between the Employer and Local 503. Both the Employer and Local 503 indicated that the reason for the hiatus was that Local 503 decided to suspend its negotiations with the Employer in the hope that the continuing negotiations between the Employer and Local 36 would prove successful, and thereby serve as a basis upon which the Employer and Local 503 could also reach an agreement.

On October 15, 1992, Local 503 received a letter from Monscour which stated the Employer was retracting its proposal that merit pay be paid retroactively. The letter concluded with the statement, "Please advise if you wish to discuss." Prompted by this letter, Local 503's president telephoned Monscour to arrange a date and time for another negotiating session. Cole hoped that since the Employer was decreasing its costs by taking retroactive pay off the table, it would be willing to yield on the union security issue.

The parties met one last time on December 17, 1992. The parties discussed the Employer's October 15th merit wage proposal. The Employer again insisted on the union-security language which would remove assistant foremen from coverage of the contract if they chose not to be Union members. The Union objected to this language as an illegal bargaining subject. Cole also indicated that the Union would not agree to the open shop provision. Cole rejected the Employer's proposal on merit wages. At the conclusion of this

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[3] At this bargaining session, the Employer modified the language of its union security proposal to a limited extent. It changed the phrase "without restriction", which dealt with the right of the foremen and assistant foremen to perform bargaining unit work, to "but not so as to cause the lay-off of a full-time situation holder." In addition, the Employer also added new sections to its merit wage proposal which dealt with how an employee would be evaluated, and specifically stated that "in no case will any employee evaluation result in a decrease in pay."

bargaining session Monscour asked Cole, "What can we do to get the problem resolved." Cole replied, "We need to continue dialogue, but how we get to a settlement I don't know."

The next and last communication between the Employer and Local 503 was a March 2, 1993, letter from Monscour, which stated that, based on receipt of objective evidence that a majority of the bargaining unit employees no longer wished to be represented by Local 503 for collective bargaining purposes, the Employer was withdrawing recognition from Local 503.[4]

With respect to the negotiations between the Employer and Local 36, these parties held their first collective bargaining session on January 15, 1991. At that time the Employer submitted, for Local 36's consideration, essentially the same union security proposal it had presented to Local 503.[5] Similarly, Local 36, through its then president Kenneth Short, objected to the proposal because accepting such a proposal would mean the demise of the Union. Short also raised the concern that the union security proposal would remove the foremen and assistant foremen from coverage under the contract.

When Local 36 later presented the Employer's union security proposal to the Union membership, the membership specifically rejected the proposal because, if the foremen and assistant foremen chose not to be Union members, they would not have to work under the provisions of the contract, and thus the Employer could avoid paying them overtime. Short raised this concern at the bargaining table, and Monscour conceded that the Employer's union security proposal would, in effect, allow the Employer to circumvent its obligation to grant overtime compensation if the foremen and assistant foremen performed the overtime work and were not Union members. Short also asked for examples of what

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[4] The Employer submitted statements to the Region which were signed and dated by 9 out of the 16 (2 of whom were admittedly supervisors) bargaining unit employees within the unit represented by Local 503, reflecting that they no longer wished to be represented by Local 503. There is no evidence of any unlawful involvement or assistance by the Employer concerning Local 503's loss of majority support.

[5] The only difference between the two union shop proposals submitted by the Employer to the Unions was the last word. In the proposal submitted to Local 503 the last word was "unit." In the proposal submitted to Local 36, the last word was "agreement."

would be the job duties of foremen and assistant foremen if they were not covered by the contract. However, Short was unable to recall what response, if any, the Employer gave to this inquiry.

Short also raised concerns at the bargaining table, as to whether, under the Employer's union security proposal, a rank and file employee's choice not to become a Union member would remove that employee from the unit. Monscour stated that, under the Employer's proposal, the provisions of the contract would still apply to all rank and file employees, regardless of their decision on Union membership. In October 1992, Short told the Employer that Local 36 would not agree to a contract unless the Employer agreed to maintain the union-security clause in the expired contract. As was the case with Local 503, Local 36 and the Employer also deadlocked on the issue of merit pay.

Finally, on November 4, 1992, the Employer presented Local 36 with its "best, firm and final" offer, which included the union security and merit wage proposals to which Local 36 had previously objected. The Union held a ratification meeting on November 11, 1992, at which an overwhelming majority of the Union membership rejected the Employer's "best, firm, and final" offer. Local 36 then decided that it would request the assistance of the International Union for the next bargaining session.

Local 36 informed the Employer of the result of the November 11, 1992 ratification vote and the Employer and Local 36 held their last negotiating session on January 6, 1993. During this meeting the International Union president stated that the Union membership would not agree to the Employer's proposed union shop clause, nor to its merit pay plan. After it became apparent that neither party was going to change its bargaining stance on the union security and merit pay issues, the Company's attorney stated, "I guess we are at an impasse." Although the parties agreed to schedule another bargaining session, the Employer's representative stated that it would be futile to meet again unless Local 36 was willing to change its bargaining position.

ACTION

We conclude that a Section 8(a)(5) and (1) Complaint should issue, absent settlement, in Case 3-CA-17715 as to the Employer's insistence to impasse on the illegal or permissive provision that assistant foremen, statutory employees, in the Local 503 unit shall not be a part of that unit if they choose not to be Union members. However, the Region should dismiss the Section 8(a)(5) charge in

Case 3-CA-17693 and the allegation as to foremen in Case 3-CA-17715 because the Employer is privileged to remove the foremen represented by both Locals and the assistant foremen represented by Local 36 from the unit if they elect not to be Union members, because they are statutory supervisors.

1. We initially conclude that Local 503's Section 8(a)(5) and (1) charge[6] against the Employer is not barred by Section 10(b) of the Act.[7]

In R. E. Dietz Company,[8] the respondent argued that the Section 8(a)(5) allegation in the Complaint alleging that it bargained to impasse over nonmandatory subjects of bargaining was barred by Section 10(b), because the bargaining impasse occurred outside of the 10(b) period. The Board held that even assuming, arguendo, that an impasse had occurred outside the 10(b) period, the parties' renewal of bargaining within the 10(b) period evidenced that the parties were not at impasse during that time. The Board then found that the respondent's insistence to impasse, within the 10(b) period, on nonmandatory subjects constituted a violation of Section 8(a)(5) not barred by Section 10(b) of the Act.

In the instant case, we conclude that the Section 8(a)(5) allegation against the Employer, in Case 3-CA-17715 involving Local 503, is not barred by Section 10(b) of the Act. The Region finds that the parties originally reached a bargaining impasse on February 25, 1992, well outside the l0(b) period.[9] However, within the 10(b) period, on October 15, 1992, the Employer notified the Union that it was retracting its proposal that merit pay be paid retroactively. The Union then arranged for another negotiating session in the hope that this change indicated that the Employer might also yield on the union security issue. Then, on December 17, 1992, within the Section 10(b) period, the parties met to negotiate further and the Employer again insisted that the foremen and assistant foremen, in the bargaining unit represented by Local 503, not be covered by the contract if these employees chose not to become Union members. Thus, within the 10(b) period the

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[6] Case 3-CA-17715.

[7] See note 1 supra.

[8] 311 NLRB No. 167 (August 9, 1993).

[9] Local 503 filed the bad faith bargaining charge in Case 3-CA-17715 on March 18, 1993.

parties were no longer at impasse and then, the Employer again insisted to impasse on this provision. Therefore, this conduct, if unlawful, would constitute a new violation of Section 8(a)(5) within the Section 10(b) period.[10] Accordingly, the charge in Case 3-CA-17715 is not barred by Section 10(b) of the Act.

2. We conclude that the Employer, in Case 3-CA-17715, violated Section 8(a)(5) and (1) of the Act by insisting to impasse upon an illegal, or at best a permissive, union-security clause that removed assistant foremen, statutory employees, from the coverage of the contract if they chose not to be members of Local 503. We further conclude that the allegation as to foremen in Case 3-CA-17715 and the charge in Case 3-CA-17693 should be dismissed, absent withdrawal, in that the Employer was privileged to remove the foremen represented by both Locals and the assistant foremen represented by Local 36 from the coverage of the contract in that these individuals are statutory supervisors.

> A. The Employer, in Case 3-CA-17715, violated Section 8(a)(5) and (1) of the Act by insisting to impasse upon an illegal or permissive union-security clause that removed assistant foremen, statutory employees, from the coverage of the contract if they chose not to be members of Local 503.

We would first argue that this union security provision was illegal because it discriminated against assistant foremen, statutory employees represented by Local 503, based upon whether they chose to be members of the Union.[11] In Thill, Inc., the Board affirmed the ALJ's conclusion that the employer violated Section 8(a)(5) of the Act when it insisted to impasse upon an illegal provision consisting of an overly broad no-solicitation rule. Similarly, in the instant case, the Employer violated Section 8(a)(5) of the Act when it insisted to impasse upon a union-security clause that violated Section 8(a)(3) of the Act. Under the Employer's union security proposal, assistant foremen would be denied any contractual benefits, for example, overtime pay and pension benefits, if they chose not to be members of

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[10] Since the Employer's December 17, 1992 insistence to impasse occurred within the Section 10(b) period, it is unnecessary to reach the issue of whether the Section 10(b) bar could be circumvented by arguing that there was a "continuing" violation.

[11] Thill, Inc., 298 NLRB 669, 672, 685 (1990).

the Union. Thus, these statutory employees would have different working conditions if they chose not to be members of Local 503. Discrimination against statutory employees based on their union membership violates Section 8(a)(3) of the Act. When the Employer insisted to impasse on its union security proposal that would cause such unlawful discrimination, the Employer was insisting to impasse upon an illegal provision in violation of Section 8(a)(5) of the Act.[12] Therefore, the Region should allege that the Employer violated Section 8(a)(5) of the Act by insisting to impasse upon an illegal provision in its union-security clause.

The Region should also argue, in the alternative, that even if the union-security provision at issue was not an illegal subject of bargaining, it was a permissive one. Consequently, the Employer violated Section 8(a)(5) by insisting to impasse on this provision. It is well settled that one party cannot force the other to bargain about permissive subjects.[13] Although merely proposing bargaining over nonmandatory subjects does not violate the Act,[14] the Board will find a Section 8(b)(3) or 8(a)(5) violation where, despite the other party's unwillingness to negotiate in that area, the proposing party continues to insist upon, and insists to impasse upon, the permissive subject.[15]

The Board and courts have long held that bargaining to impasse over a permissive subject constitutes a refusal to bargain over mandatory subjects in violation of Section 8(a)(5).[16] The definition or scope of an established bargaining unit is a permissive subject of bargaining that can be changed only upon the mutual consent of the parties

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[12] Id.

[13] See, e.g., NLRB v. Wooster Div. of Borg Warner Corp., 356 U.S. 342 (1958).

[14] Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass, 404 U.S. 157 (1977).

[15] Taft Broadcasting Company, 274 NLRB 260, 261 (1985); Natl. Fresh Fruit & Vegetable Co., 227 NLRB 2014, 2015 (1977), enf. denied 565 F.2d. 1331 (5th Cir. 1978); Local 964, Carpenters (Contractors & Suppliers Assn. of Rockland County, N.Y.), 181 NLRB 948, 952 (1970).

[16] See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958); The Idaho Statesman, 281 NLRB 272, 275 (1986).

involved or through appropriate Board proceedings.[17] The Board recently reiterated this principle in its decision in Antelope Valley Press.[18]

> Thus, in determining whether an employer's contract proposal is lawful, we shall first look to see whether the employer has insisted on a change in the unit description. In accord with long-established precedent, we shall continue to find any such insistence to be unlawful... Antelope Valley Press, supra, slip op. at 3.[19]

In the instant case, the Region should argue, in the alternative, that the Employer violated Section 8(a)(5) of the Act by insisting to impasse upon a permissive subject of bargaining, i.e. upon a union-security clause that removed assistant supervisors, statutory employees, from the coverage of the contract if these individuals chose not to be members of Local 503. This provision would be a permissive subject of bargaining because it changed the scope of the unit. The Employer's proposal effectively removed nonunion assistant foremen from the bargaining unit by not applying the contract to them. As noted above, the definition or scope of an established bargaining unit is a permissive subject of bargaining that can be changed only upon the mutual consent of the parties involved or through

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[17] See, e.g., Bozzuto's, Inc., 277 NLRB 977 (1985). In Bozzuto's, Inc., the Respondent insisted to impasse upon changing the recognition clause of the contract to eliminate employees working less than 32 hours a week. The Board held that the respondent violated the Act by insisting to impasse upon a change in the recognition clause that would change the scope of the bargaining unit.

[18] 311 NLRB No. 50 (May 28, 1993). The Board reaffirmed the principles set forth in Antelope Valley Press in a decision issued the same day in Bremerton Sun Publishing Co., 311 NLRB No. 41 (May 28, 1993).

[19] In addition, the Board also held in Antelope Valley Press that if the employer does not insist on changing the unit description, but seeks an addition to that clause that would grant it the right to transfer work out of the unit, it will find the employer acted lawfully provided that the addition does not attempt to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit. This aspect of the Board's holding in Antelope Valley Press is not presented in the instant case.

appropriate Board proceedings. Local 503 objected to the Employer's attempt to remove assistant foremen from the bargaining unit based upon their failure to become members of the Union.[20] Therefore, the Employer violated Section 8(a)(5) of the Act when it insisted to impasse upon this provision in the proposed union-security clause.[21]

The Employer's defense that Local 503 consented to the provision in the proposed union-security clause that removed nonunion assistant foremen from contract coverage is without merit.[22] We initially note that Local 503 objected generally to the union-security clause proposed by the Employer. In addition, Local 503 president Cole specifically objected to the removal of nonunion assistant foremen from contract coverage and noted that if assistant foremen were removed from the unit they would lose their pension benefits.

Similarly, we conclude that Local 503 did not waive its right to bargain over the Employer's union security proposal. The Board has held that "[d]uring negotiations, a union must clearly intend, express, and manifest a conscious relinquishment of its right to bargain before it will be

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[20] The bargaining unit represented by Local 503, in this case, was not changed through an appropriate Board proceeding.

[21] The Employer may argue that its proposed union security clause is not a permissive subject of bargaining, because the scope of the unit would only be changed if an assistant foreman represented by Local 503 chose not to be a member of the Union. In other words, the scope of the unit would not be changed if all of the assistant foremen represented by Local 503 chose to be members of the Union. This argument is without merit because the clause proposed by the Employer has the potential of changing the scope of the bargaining unit without the consent of the Union and without appropriate Board proceedings. The uncertainty created by this potential change in the scope of the unit destabilizes the collective bargaining relationship between the parties and therefore undermines the purposes and policies of the National Labor Relations Act.

[22] This defense would only relate to the argument that this union security provision is permissive. Union consent to an illegal provision would not privilege the Employer's insistence to impasse on an illegal provision. See Honolulu Star-Bulletin, 123 NLRB 395, 403 (1959).

deemed to have waived its bargaining rights."[23] As was stated above, Local 503 objected to the Employer's open shop proposal in general and specifically objected to the provision in the proposal that removed assistant foremen from the coverage of the contract. Also, waiver is not clearly at issue where a permissive subject is involved because the employer's insistence to impasse on such a subject violates the Act unless the Union actually consents to the Employer's proposal. Here, it is clear that Local 503 never gave such consent.[24]

Finally, the Employer's defense that it never insisted to impasse on the relevant provision of the union-security clause is also without merit. In Thill, Inc.,[25] the Board held that the respondent had insisted to impasse on an illegal proposal when it included the proposal in its final offer to the Union. Here, the Employer's final proposal offered to Local 503 included the union-security clause with the provision removing nonunion assistant foremen from the bargaining unit if they chose not to be members of the Union. The Employer failed to withdraw or modify this portion of the union-security clause after the Union objected to it within the 10(b) period at the December 17th meeting. Consequently, the parties reached impasse on that provision.

B. We conclude that the Employer did not violate Section 8(a)(5) and (1) of the Act by insisting to impasse upon a union shop clause that removed assistant foremen from the bargaining unit represented by Local 36, and removed foremen from the bargaining units represented by Local 503 and Local 36, if these individuals chose not to be members of the Union.

The Employer's decision to remove statutory supervisors from the unit is not a permissive subject that requires the Union's consent prior to implementation. Rather, it is akin

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[23] Intermountain Rural Electric Assn., 305 NLRB 783, 786 (1991), citing to Construction Services, 298 NLRB 1, 2 (1990) and cases cited therein.

[24] Cf. Howard Electrical & Mechanical, 293 NLRB 472, 475 (1989) ("...when a party unilaterally changes the scope of the bargaining unit, it is irrelevant whether impasse has been reached. The only question is whether the other party has consented to the change).

[25] Id.

to certain "management decisions" that the Employer may voluntarily agree to bargain about, but to which no bargaining obligation obtains. Therefore, the Employer may implement a provision, after contract expiration, removing statutory supervisors from the bargaining unit without bargaining with the Union.[26]

In McClatchy Newspapers, Inc.,[27] the Board affirmed the ALJ's conclusion that the Employer's unilateral removal of press operators from an established press room unit was lawful, since it found, in agreement with the ALJ, that these employees were Section 2(11) supervisors. In McClatchy, supra, the ALJ stated, "...statutory supervisors may be included in a bargaining unit by mutual agreement. It should follow that once the contract expires, neither party is obligated to include the statutory supervisors in the succeeding agreement."[28]

In the instant case, the Region found, and it is undisputed, that the foremen and assistant foremen represented by Local 36, and the foremen represented by Local 503, are Section 2(11) supervisors within the meaning of the Act. Therefore, the Employer did not violate the Act when, in bargaining for a new contract, it insisted to impasse on the removal of these supervisors from the bargaining unit if they decided not to be Union members. Further, since the Employer would have been free to refuse the Union's request to include Section 2(11) statutory supervisors in the unit, neither the Employer's limiting its authority to remove its supervisors from the unit by granting them the option to remain in the unit, nor its insistence that the contract embody this limitation, violates the Act.

Also, the fact that the Employer's proposal provided for removal of these supervisors from the unit only if they are not Union members does not render the proposal unlawful or permissive. Thus, a Section 2(11) supervisor is not entitled to the protections of the National Labor Relations Act.[29]

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[26] See First National Maintenance v.. NLRB , 452 U.S. 666, 686 (1981).

[27] 307 NLRB No. 122 (May 29, 1992).

[28] 307 NLRB at 778.

[29] See, e.g. Parker Robb, Chevrolet, Inc., 262 NLRB 402 (1982) and its progeny.

Finally, we reject the Unions' argument that the Employer's proposal is unlawful or permissive because it would force them to accept into their respective units unwanted statutory supervisors who chose to be members of the Union. If the Employer had insisted to impasse upon such a proposal over the objection of the Unions, it would have violated Section 8(a)(5) of the Act.[30] However, the facts in this case clearly do not support this contention by the Unions. First, both expired contracts allowed the supervisors to be members of the Union. Second, both Unions themselves submitted proposals requesting that supervisors would be allowed to be Union members and members of the bargaining units. Third, at no time during the negotiations did either Union depart from its demand that supervisors be allowed to be Union members, covered by the contract and included in the bargaining unit. Accordingly, the Unions' argument that the Employer is unlawfully insisting on including Section 2(11) supervisors in the bargaining unit is without merit in that it is completely unsupported by the facts presented here.

Accordingly, the Region should issue a Section 8(a)(5) and (1) Complaint, absent settlement, in Case 3-CA-17715 as to assistant foremen. In addition, the Region should dismiss the Section 8(a)(5) and (1) charge in Case 3-CA-17693; and the 8(a)(5) and (1) allegation as to foremen in Case 3-CA-17715.

R.E.A.

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[30] See McClatchy Newspapers, Inc,, supra, at 778.